UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2753

September Term, 2013

CURTIS LEONARD HAMM

v.

STATE OF MARYLAND

Arthur,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: September 16, 2016

After a four-day jury trial in the Circuit Court for Baltimore County, appellant Curtis Leonard Hamm was convicted of two counts of first degree assault and two counts of use of a firearm. On appeal, appellant asks: whether the trial court erred by excluding evidence that would explain why certain alibi witnesses were not present to testify at appellant's trial. We hold that this issue was not preserved and shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

On September 16, 2012, brothers Jesse and Benjamin Peart were walking home from a neighborhood football game sometime between 8:15 and 8:30 p.m. Two masked men approached the brothers, and instructed them to "take everything out." One of the men carried a shotgun, the other carried a bat or similar object. The man carrying the object struck both of the brothers, then ran in the direction of appellant's home. The masked man who carried the shotgun entered a car that Jesse recognized as belonging to Hiydeen Womack. Jesse stated that the assault took approximately 4 to 5 minutes; his brother Benjamin testified that the assault took approximately 2 to 3 minutes. The State charged appellant with two counts each of armed robbery, robbery, first degree assault, theft under $1,000.00, and use of a firearm.

Mr. Womack negotiated a plea agreement with the State whereby he agreed to plead guilty to first degree assault and to testify as a witness for the prosecution at appellant's trial. In exchange for Mr. Womack's cooperation and testimony, the State agreed to recommend a ten-year sentence, with all but a year and a half suspended. Mr. Womack

testified that appellant's girlfriend drove him, appellant, and an unnamed individual to find Jesse and Benjamin Peart in order to assault them. According to Mr. Womack, the assault happened quickly, taking fewer than ten minutes. Mr. Womack acknowledged striking Benjamin and testified that appellant assaulted both victims. After the assault, Mr. Womack testified that he escaped by running down the street, whereas appellant returned to the car. The two reunited at appellant's house.

That the assault occurred in close proximity to appellant's home was an important factor in appellant's trial. Appellant was under house arrest at the time of the attack and wore an electronic monitoring device provided by Advantage Sensing Alternative Programs ("A.S.A.P."). Danielle Winchester, a program manager for A.S.A.P., testified as a witness for appellant. Ms. Winchester explained that home detention equipment does not immediately trigger when a subject moves beyond the permitted range. Instead, the equipment can be programmed to trigger an alert when a subject remains outside the permitted range for any time between three and twelve minutes. Ms. Winchester testified that she had set appellant's equipment to trigger an alert when he remained outside the permitted range for six minutes, and that appellant's equipment did not trigger on the day of the assault.

Appellant's girlfriend, Jasmine Jones, testified that on the day in question she was having a cookout with appellant and his family at appellant's home. During Ms. Jones' direct examination by counsel, the following colloquy took place:

[DEFENSE COUNSEL]: Okay. Now, who else was home that day?

MS. JONES: All of us were home that day. So, his grandmother, mother, younger brother and his sister. Dog. Me.

[DEFENSE COUNSEL]: All right.

MS. JONES: Every, every --

[DEFENSE COUNSEL]: And today, where are his grandmother and his mother?

MS. JONES: They're at home.

[DEFENSE COUNSEL]: And why is that?

MS. JONES: Um, his mother and his grandmother--

[PROSECUTOR]: Objection.

[THE COURT]: Sustained.

Defense counsel did not ask Ms. Jones any additional questions relating to the absence of appellant's mother and grandmother and made no proffer of the testimony she hoped to adduce.

DISCUSSION

In his appeal, appellant asks whether the trial court correctly sustained the State's objection, thereby excluding Ms. Jones' testimony. We do not reach that issue because it was not preserved for review. Maryland Rule 5-103(a) provides that:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was requested by the court or required by rule; or

> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered. The court may direct the making of an offer in question and answer form.

The Court of Appeals has succinctly stated the general rule: "[T]he question of whether the exclusion of evidence is erroneous and constitutes prejudicial error is not properly preserved for appellate review unless there has been some formal proffer of what the contents and relevance of the excluded testimony would have been." *Mack v. State*, 300 Md. 583, 603 (1984), *abrogated on other grounds by Price v. State*, 405 Md. 10, 27-29 (2008). The rule ensures that a reviewing court can fairly assess a trial judge's exercise of discretion. *Waldron v. State*, 62 Md. App. 686, 698 (1985). The Court of Appeals reiterated that "a principal purpose of the preservation requirement is to prevent 'sandbagging' and to give the trial court the opportunity to correct possible mistakes in its rulings." *Bazzle v. State*, 426 Md. 541, 562 (2012) (citing *Fisher v. State*, 367 Md. 218, 240 (2001)). On the other hand, no formal proffer is required where the record clearly demonstrates what the examiner is trying to accomplish. *Jorgensen v. State*, 80 Md. App. 595, 601-02 (1989).

Here, after the court sustained the objection, appellant's counsel failed to proffer the testimony expected from Ms. Jones. Appellant now contends that no additional proffer was required. Instead, appellant notes that on the second day of trial his counsel explained to the court that his mother was home taking care of his ill grandmother, and that neither

would be called as a witness. The court's ruling to exclude evidence occurred in the appellant's case on the third day of trial.

We disagree with appellant's contention that no additional proffer was required. In *Merzbacher v. State*, 346 Md. 391 (1997), the trial court, in a child sexual abuse case, prevented the defense from eliciting testimony from an Archdiocese of Baltimore official concerning whether other sexual abuse complaints had been lodged against the defendant during his tenure as a teacher. *Id*. at 416. Before the official could answer, the State objected and the court sustained the objection. *Id.* The defendant's attorney asked the question a second time and again the State's objection was sustained. *Id.* On appeal, the defendant conceded that no formal proffer was made, but argued that no proffer was required "because the answer he was seeking was apparent from the question." The Court disagreed, stating that "[w]e are in no position as an appellate court to discern what that answer may have been, whether favorable or unfavorable to the defense." *Id.*

We reached the same conclusion in *Tetso v. State*, 205 Md. App. 334 (2012). There, the defendant was convicted of murdering his wife, Tracey. At trial, the defendant sought to elicit testimony as to whether Tracey "had run away from home in the past" and whether "she was seen by witnesses after the date the State claimed she was murdered." *Id.* at 399. We held that the issue was not preserved for appellate review:

> In this case, appellant contends that "the evidence [he] sought to introduce was clear from the questions asked" and, as such, a proffer of the answers sought was not necessary. We disagree. During the cross-examination of Gardner, Tracey's stepmother, appellant asked: "Did she [Tracey] have run-away problems with you all[,]" and during the cross-examination of Detective Marll, appellant asked: "And you went and

> interviewed Mr. Kerr about [Tracey] being in Pennsylvania[,]" and "Now, did you ever go out and interview a Thomas Tyler . . . And that was another in regard to this, a report of [Tracey] in this case, a report of [Tracey]". After all three of these questions, the State objected, and the circuit court sustained the objections. Appellant's counsel continued cross-examination without offering a formal proffer of the content and materiality of the excluded testimony. As such, a claim that the exclusion of evidence constitutes reversible error is not preserved for review.

Id. at 401 (citation omitted). *Accord Green v. State*, 127 Md. App. 758, 766 (1999); *Robinson v. State*, 66 Md. App. 246, 253-55 (1986).

Merzbacher and *Tetso* support our conclusion that appellant failed to preserve the trial court's ruling for review. Appellant's counsel asked Ms. Jones only one question concerning the reasons for the grandmother's and mother's absence at trial. The State objected and the trial judge sustained the objection. The defense attorney made no proffer as to Ms. Jones' purported answer. There are many hearsay and non-hearsay responses that the witness could have offered in response to the question. Absent a definite proffer, the trial judge was denied the opportunity to evaluate the admissibility of Ms. Jones' testimony. Furthermore, we reject appellant's contention that he properly preserved the issue when he advised the court on the second day of trial why his mother and grandmother would not be called as witnesses. Unlike an appellate court, the trial court does not have "the leisure to stitch together different pieces of transcript" to determine where a party wishes to go. *Peterson v. State*, 444 Md. 105, 141 (2015).

Our statement in *State v. Funkhouser*, 140 Md. App. 696, 719 (2001) is applicable here: "One of the undergirding principles of the preservation requirement is that a trial judge will not be 'sandbagged' by an issue that was not squarely raised." We conclude

that the exclusion of Ms. Jones' testimony was not preserved and, therefore, affirm the judgment below.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.